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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

CASE NO. 79-458

BEATRICE R. DONNER,

Appellant,

vs.

PAUL B. ANTON, WILLIAM I. DONNER, RUTH JEAN DONNER, LARNA KATZ DONNER, EDWARD DAVID DONNER,

Appellees.

JURISDICTIONAL STATEMENT

On Appeal From the Supreme Court of Florida

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and
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JURISDICTIONAL STATEMENT

Beatrice Rosalie Donner appeals from a decision of the Supreme Court of Florida. This jurisdictional statement is submitted in accordance with Rule 15 of this Court.

The only reported opinion of the courts below is *In Re Estate of Donner,* 364 So.2d 753 (Fla.3d DCA 1978), *cert.den.*, ____ So.2d ____ (Fla.1979) (A 19-28).

Jurisdiction is based on 28 U.S.C. §1257(2). In the lower courts, Beatrice's attack on the constitutionality of the Florida dower statute under fourteenth amendment equal protection was rejected. Beatrice requests that her appeal be considered a petition for certiorari if the appeal is improvidently taken.

Beatrice seeks review of an order of the Florida Supreme Court refusing to review by certiorari the decision of the Third District Court of Appeal cited above; this order was entered on June 21, 1979. The notice of appeal was filed in the Circuit Court in Dade County, Florida, on September 12, 1979 (A 34).

Jurisdiction is conferred on this Court for the appeal by 28 U.S.C. §1257(2). Jurisdiction is sustained by *Royster Guano Co. v. Virginia,* 235 U.S. 412 (1920); *Reed v. Reed,* 404 U.S. 71 (1971); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Orr v. Orr,* ____ U.S. ____; 59 L.Ed.2d 306 (1979); *Caban v. Mohammed,* ____ U.S. ____; 60 L.Ed.2d 297 (1979).

Florida's former dower statute, here challenged, is found in section 731.34 of the Florida Statutes (1971):

731.34 Dower in realty and personalty. — Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her husband, or both, she may elect in the manner provided by law to take dower, which dower shall be one third in fee simple of the real property which was owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one third part absolutely of the personal property owned by her husband at the time of his death, and in all cases the widow's dower shall be free from liability for all debts of the decedent and all costs, charges, and expenses of administration; . . .[1]

QUESTION PRESENTED

A DOWER STATUTE AWARDING THE VAST BULK OF HIS ESTATE TO DECEDENT'S THIRD WIFE OF 33 DAYS, AT THE EXPENSE OF TWO FORMER WIVES EACH MARRIED TO DECEDENT APPROXIMATELY 14 YEARS AND DEPENDENT FOR SUPPORT UPON CONTRACTS OR JUDGMENTS FOR SUBSTANTIAL PORTIONS OF HIS ESTATE, VIOLATES EQUAL PROTECTION.

[1]The dower statute was repealed in 1974, Chapter 74-106, Laws of Florida, and replaced by an elective share, paid after debts. Fla. Stat. §§733.201-733.212 (1977).

STATEMENT OF THE CASE

Thrice married Samuel Donner died on January 25, 1973. Sam married Beatrice on August 4, 1945. They divorced on April 11, 1959. Their adopted son, Edward, is Sam's only child. A separation agreement provided that if Beatrice survived Sam and did not remarry he would will to her outright, one-third of his net estate, equivalent to a wife's intestate share under 1959 New York law.[2]

At about the time of her divorce, Beatrice suffered from cancer. It is presently in remission. Her health is poor. In the six and one-half years since Sam's death, she has received approximately $150,000 from the estate for her support. She depends exclusively upon this money and has been able to hold a job only sporadically because of her poor health. Money from the estate would have totally stopped last year but for the guarantee of one of the personal representatives that if monthly payments of $1,500 to Beatrice exceeded her entitlement from the estate, the personal representative would repay any overage from his fees.

Ruth Donner married Sam on July 16, 1959. They were divorced October 10, 1972. Ruth has received approximately $450,000 in alimony from the estate. Sam left her a legacy in the amount of one million dollars pursuant to their separation agreement.

[2]Sam omitted Beatrice from his will and she had to enforce her rights under the full faith and credit clause of the United States Constitution. Donner v. Donner, 302 So.2d 452 (Fla.3d DCA 1974), *cert.den.*, 314 So.2d 151, appeal dismissed, 314 So.2d 589 (Fla.1975). Edward David Donner, son of Sam and Beatrice, enforced his right to one-third of the net estate in the same appellate decision.

Larna Donner married Sam on December 22, 1972, 33 days before he died. Larna had her own assets and income at the time of her marriage to Sam, and did not have to depend upon the money from his estate for her existence.

At the time of his death, Sam's gross estate was valued at approximately 7.2 million dollars. The estate will receive at least 1.8 million dollars in income during the course of administration. This nine million dollars will be distributed approximately as follows:

Debts	1.5 million
Administration Expenses	1.5 million
Larna's Dower	3 million
Federal Taxes	1.5-3 million

As can be seen from this brief tabulation, the amount Beatrice receives will depend principally upon the amount of taxes the estate must pay. Whatever is left over after payment of administration expenses, taxes, debts and dower will be shared by Beatrice, Edward and Ruth. All three have been adjudicated to be in the position of legatees of the estate, notwithstanding the fact that both Beatrice and Edward have judgments against the estate. Estate accountants have calculated that Beatrice's one-third of the nine million dollar estate will be approximately $300,000. This one-third is so small because Larna's dower has priority over Beatrice and is deducted as a debt in calculating the amount Beatrice is entitled to. Under the formulas and priorities used by the Florida courts, Larna's one-third of the estate is three million dollars. Its receipt is certain. Half of Beatrice's $300,000 is still in jeopardy. Ruth will receive substantially less than her legacy calls for because of the dower election.

Shortly after Larna elected to take dower under the quoted statute during the probate of Sam's estate, Beatrice objected to the election. In her pleading, Beatrice contended that section 731.34 of the Florida statutes is unconstitutional, *inter alia* under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, to the extent that the statute gives Larna Donner any greater right or benefit in the estate than Beatrice receives (A 1-3). That contention was rejected in the "Order Determining Priorities" entered in the estate proceeding on October 12, 1976. The order determined that Larna's dower portion of the estate had priority over Beatrice's entitlement, and also that dower would be deducted in determining the amount of Beatrice's judgment (A 6-18). Beatrice made the same constitutional argument in her appellate brief in the Third District Court of Appeal. That court rejected the argument, without specifically mentioning it (A 19-28). Again, Beatrice raised the point in her brief in the Supreme Court of Florida. Certiorari was denied without opinion (A 29-33).

ARGUMENT

The Probate Court's "Order Determining Priorities" (A 6-18) necessarily determined that the dower statute was valid, notwithstanding Beatrice's equal protection attack. Under 28 U.S.C. §1257(2) appeal is the proper method of review when validity of a state statute is drawn in question on the ground it is repugnant to the Constitution of the United States, and the decision is in favor of its validity.

It is well established under the decisions of this Court that legislative classifications must be

reasonable, not arbitrary, and "must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Caban v. Mohammed,* ___ U.S. ___; 60 L.Ed.2d 297 (1979).

At common law and in Florida, the purpose of dower "was to furnish means and sustenance for the wife, and for the nurture and education of the younger children, after the death of the husband and father." *Moore v. Price,* 123 So. 768, 772 (Fla.1929). When Sam died, Beatrice and Ruth both were dependent upon him for their support. Both received alimony. Beatrice's stopped when Sam died. Ruth's continued. Both were promised by contract or judgment that substantial sums of money would be left by will. Shortly, Beatrice's sustenance will be eliminated by the dower awarded to Larna under the challenged statute.

The dower statute arbitrarily picked Larna from among the "class" of Sam's wives, and favored her with the vast bulk of his distributable estate. This discriminatory choice has no relation to the object of the legislation. It cannot be said to be the purpose of dower to permit a wife of 33 days to live in great luxury while the first wife and the decedent's only child, with judgments for their support, starve.[3] The application of the

[3]Compare the approach taken by the Federal Social Security laws. Benefits are provided to a widow, defined *inter alia,* as a surviving wife married to the decedent for not less than nine months immediately prior to death, and to a divorced wife, who had been married to the decedent for ten years prior to divorce. 42 U.S.C.A. §§402, 416.

dower statute in this case is totally inconsistent with its purpose because the widow's advantage is not gained over only a group of general creditors, but at the expense of two former wives and a son of the decedent — all of whom are more entitled to the protection of the state than is this widow.

In recent years, this Court has not hesitated to scrutinize statutes affecting domestic relationships in an equal protection context.[4] In *Orr v. Orr,* ___ U.S. ___; 59 L.Ed.2d 306 (1979), this Court invalidated Alabama's alimony statute because it denied alimony to men. The Court agreed "that assisting needy spouses is a legitimate and important governmental objective", but required a determination whether the classification at issue is substantially related to achievement of those objectives. It was not. Nor can it be said that Florida's dower statute, in singling out the last among several wives for special benefit at the expense of the others, creates a classification substantially related to achievement of the objective of the statute. See also the dissenting opinion of Justices Brennan and Marshall in *Kahn v. Shevin,* 416 U.S. 351, 360 (1974) which criticizes the Florida widow's property tax exemption statute because its benefit is provided equally to a financially independent heiress as well as an unemployed widow with dependent children.

[4]Caban, *supra;* Stanley v. Illinois, 405 U.S. 645 (1972); Stanton v. Stanton, 421 U.S. 7 (1975).

CONCLUSION

For the reasons stated, this Court should find that it has probable jurisdiction and give plenary consideration to the dower statute's clear violation of equal protection of law.

Respectfully submitted,

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Appendix

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION

Case No. 73-2814 (Dowling)

IN RE:

ESTATE OF SAMUEL DONNER,
Deceased.

OBJECTION TO ELECTION TO TAKE DOWER, DEMAND FOR JURY TRIAL, AND REQUEST FOR EQUITABLE APPORTIONMENT

BEATRICE ROSALIE DONNER, the first wife of the decedent and holder of a judgment entitling her to one-third (1/3) of his net estate, objects to the election to take dower filed herein by wife three, LARNA KATZ DONNER, on the following grounds, and Beatrice Doner requests the relief outlined herein:

1. Larna Katz Donner had actual knowledge, or she should have known of the agreement (and judgments) between Samuel Donner and Beatrice Rosalie Donner which required Samuel to leave to Beatrice one-third (1/3) of his net estate and to their son, Edward David Donner, one-third (1/3) of his net estate. Notwithstanding this knowledge, Larna Donner conspired with and assisted Samuel in omitting Beatrice entirely from his will and eliminating most of what

Samuel agreed to leave to his son, Edward. Because of her actions, Larna Katz Donner should be barred completely from any dower in this estate.

2. Pursuant to Section 733.12(3) of the Florida Statutes, Beatrice demands trial by jury on Larna's right of dower.

3. In the event it is found that Larna is entitled to dower, Beatrice requests the further and additional relief:

(a) That this Court declare and establish her lien on one-third (1/3) of the net estate pursuant to the Alabama judgment divorcing Samuel and Beatrice, the Florida judgment which domesticated the Alabama judgment, and the Separation Agreement incorporated therein by reference, and that said one-third (1/3) of the net estate subject to the lien of Beatrice be eliminated from the portion of the estate from which dower is assigned, pursuant to Section 731.34 of the Florida Statutes.

(b) That this Court declare Section 731.34 of the Florida Statutes unconstitutional to the extent that said statute would purport to give Larna Katz Donner any greater right or benefit in the estate of Samuel Donner than that which Beatrice is ultimately to receive. If Larna receives more from this estate than does Beatrice under Section 731.34, the statute would be violative of Article I, Sections 2, 9 and 10 of the Florida Constitution, and Article I, Section 10 and the due process and equal

protection clauses of Amendment XIV of the United States Constitution. *In re Estate of Humphreys,* 299 So.2d 595, 598 (Fla. 1974) (dissenting opinion).

(c) That any dower which said Larna Katz Donner might be awarded should in equity be reduced to such amount as it would have been had she and Samuel Donner entered into an antenuptial agreement embodying the provision which Samuel Donner agreed in his property settlement with Ruth Jean Donner that he would require of another prospective wife. To permit otherwise would work to the detriment of Beatrice Donner in the collection of her judgment against the Estate of Samuel Donner.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to all attorneys listed on the attached sheet this 12th day of February 1975.

SINCLAIR, LOUIS & SIEGEL
Attorneys for Beatrice R. Donner
1600 Alfred I. DuPont Building
Miami, Florida 33131

BY_____
PAUL SIEGEL

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION

Case No. 73-2814 (Judge Dowling)

IN RE: The Estate of
SAMUEL DONNER,
Deceased.

SUPPLEMENT TO OBJECTION OF BEATRICE R. DONNER TO ELECTION OF LARNA KATZ DONNER TO TAKE DOWER

BEATRICE R. DONNER herewith files her Supplement to Objection to Election of Larna Katz Donner to Take Dower to add thereto an additional paragraph numbered and stated as follows:

"4. Larna Katz Donner interfered with the contractual relations existing between BEATRICE R. DONNER and Edward David Donner and the deceased by reason of the provisions to be made for BEATRICE R. DONNER and Edward David Donner incorporated in the Separation Agreement between BEATRICE R. DONNER and the deceased, the Alabama judgment divorcing the parties and the Florida judgment domesticating the said Alabama judgment.

WE HEREBY CERTIFY that the foregoing was mailed to all attorneys on the list attached hereto, this 23rd day of December, 1975.

SINCLAIR, LOUIS & SIEGEL
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1600 A. I. duPont Building
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BY P.A.L

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

PROBATE DIVISION

CASE NO. 73-2814

Judge Frank B. Dowling (Div. 32)

IN RE: ESTATE OF
SAMUEL DONNER,
Deceased.

ORDER DETERMINING PRIORITIES

THIS CAUSE came on to be heard before the Court upon petition for the entry of an Order determining the priority of conflicting claims made by the principal beneficiaries of this estate. The contesting parties and their respective relationship to the decedent, SAMUEL DONNER, and the nature of their claim may be briefly stated as follows:

(1) *LARNA KATZ DONNER,* Surviving Spouse:

LARNA KATZ DONNER was lawfully married to the decedent on or about December 22, 1972 in the State of Florida. SAMUEL DONNER died on January 25, 1973. She has elected against the Last Will and Testament of the decedent and claims the right of dower conferred upon her by the

laws of the State of Florida in effect at the time of the decedent's death. LARNA KATZ DONNER claims that her right of dower is paramount and superior in priority to the claims of the other contesting parties.

(2) *RUTH JEAN DONNER,* the Second Wife of the decedent, who was divorced from him on October 10, 1972 by Decree entered in the Circuit Court, Dade County, Florida:

RUTH JEAN DONNER claims by virtue of a Separation Agreement entered into between her and the decedent on August 4, 1972 wherein the decedent agreed as follows:

> "8. *Will Provision.* The Husband shall, as part of the settlement, promptly make, execute, and keep in effect until his death, a will under which the Husband shall devise and bequeath unto his Wife, if living, the sum of ONE MILLION ($1,000,000.00) DOLLARS, free of all estate and inheritance taxes. Such bequest shall be payable regardless of whether or not the wife shall have remarried prior to the death of the Husband. In the event the Husband, shall remarry, the Husband agrees that he will, prior to any such marriage, enter into an antenuptial agreement whereby his intended wife will relinquish any claim of dower or right of inheritance which would, but for such antenuptial agreement, diminish the sum to be received by the present wife under the provisions of this paragraph."

The decedent performed his obligation in the Settlement Agreement to the extent that he did make a bequest in his Last Will to RUTH JEAN DONNER in the sum of ONE MILLION ($1,000,000.00) DOLLARS, free of all estate and inheritance taxes. He violated his Settlement Agreement with her in that he executed an Antenuptial Agreement with his surviving spouse, LARNA, wherein he failed to incorporate the provision that would protect RUTH JEAN DONNER's bequest in the event his wife to be, LARNA, elected to take dower in his estate. RUTH JEAN DONNER claims priority to the dower rights of LARNA KATZ DONNER to the extent that any deficiency in her bequest of ONE MILLION DOLLARS, tax free, shall result by virtue of LARNA KATZ DONNER's election to take dower and that such deficiency should be charged and subrogated against the right of LARNA KATZ DONNER to receive dower in her husband's estate.

(3) *BEATRICE R. DONNER,* the First Wife of the decedent:

BEATRICE R. DONNER and SAMUEL DONNER were divorced on April 11, 1959. They had been husband and wife since August 4, 1945 and during the course of their marriage had adopted a son, EDWARD DAVID DONNER. Prior to the divorce of BEATRICE and SAMUEL, they entered into a Separation Agreement on March 2, 1959 wherein it was provided among other things in Paragraph A (5) as follows:

> "(5) The Husband agrees that if the Wife shall survive him and shall not have remarried during his lifetime, he will, by his Last Will and Testament, devise and bequeath to the Wife, outright, one-third (⅓) of his net estate (which is the equivalent of an intestate share of a wife in accordance with the laws of the State of New York presently in force and effect.)."

SAMUEL DONNER failed to provide for BEATRICE R. DONNER in his Last Will and Testament.

Upon the death of SAMUEL DONNER, BEATRICE R. DONNER filed her claim against the decedent's estate seeking enforcement of the provisions of the Separation Agreement above quoted. Objection to her claim having been filed, she instituted a Complaint for specific performance of the Separation Agreement in General Jurisdiction Division of the Circuit Court of Dade County, Florida, in Case No. 73-5012. In that case a Summary Judgment was entered providing as follows:

> "2. Plaintiff Beatrice Rosalie Donner be and is hereby declared entitled to, and shall recover of and from Charles N. Donner and William I. Donner, or their successors, as Executors of the Estate of Samuel Donner, deceased, Case No. 73-2814, Probate Division of this Court '. . . outright, one-third (⅓) of his net estate (which is the equivalent of an intestate share of a wife in accordance with the laws of the State of New York) . . .' in effect March 2, 1959 in accordance with the terms and provision of the final Divorce Decree entered on the 10th day of April 1959

by the Circuit Court of Marion County, State of Alabama in Case No. 7605 entitled: Beatrice Rosalie Donner vs. Samuel Donner."

This Summary Judgment was appealed and affirmed. Opinion reported *Donner v. Donner,* 305 So.2d 452 (Fla. App. 3d 1974), cert. den., 314 So.2d 151. BEATRICE R. DONNER claims that her Final Judgment affirmed on appeal places her in a position of judgment creditor against the estate of the deceased and that her right to one-third of the net distributable estate of the decedent as provided in said Judgment is paramount and superior to the claims of all other interested parties in this proceeding.

(4) *EDWARD DAVID DONNER,* the adopted son of SAMUEL DONNER and BEATRICE R. DONNER:

EDWARD DAVID DONNER claims under a provision contained in the Separation Agreement between BEATRICE R. DONNER and SAMUEL DONNER under date of March 2, 1959 wherein it was provided as follows:

"The Husband agrees that, if his son shall survive him, he will, by his Last Will and Testament, irrevocably devise and bequeath to his said son one-third (⅓) of his net estate, both real and personal, unless other children shall hereafter be born to or adopted by the Husband, in which event the Husband will irrevocably devise and bequeath to

said son of the parties hereto a share of his net estate, both real and personal, equal to one-third (⅓) thereof divided by the total number of the Husband's children (including his said son), him surviving."

By his Last Will and Testament SAMUEL DONNER failed to provide for his son, EDWARD DAVID DONNER, in accordance with the provisions in his behalf above quoted. No other children were born to or adopted by SAMUEL DONNER. EDWARD DAVID DONNER was made a party defendant in the cause of action filed by BEATRICE R. DONNER for the enforcement of her claim against the decedent's estate and he, in that cause, filed a cross-complaint for relief and specific performance of the provisions of the Separation Agreement made in his behalf. The Summary Judgment entered in that cause was entered in favor of EDWARD DAVID DONNER in the following language:

"4. Defendant cross-plaintiff Edward David Donner be and is hereby declared entitled to, and shall recover of and from Charles N. Donner and William I. Donner, or their successors, as Executors of the Estate of Samuel Donner, deceased, Case No. 73-2814, Probate Division of this Court '. . . one-third (⅓) of his net estate both real and personal . . .' in accordance with the terms and provisions of the final Divorce Decree entered on the 10th day of April 1959 by the Circuit Court of Marion County, State of

Alabama in Case No. 7605, entitled: Beatrice Rosalie Donner vs. Samuel Donner."

On appeal as above mentioned, this Summary Judgment was affirmed. EDWARD DAVID DONNER now claims as a judgment creditor against the estate of SAMUEL DONNER, deceased, and asserts priority of his claim above all other claimants other than BEATRICE R. DONNER.

THE RIGHTS OF THE CLAIMANTS WILL BE DISCUSSED IN THE ORDER ABOVE SET FORTH.

1. *LARNA KATZ DONNER* was lawfully married to the decedent and is his surviving spouse. As such, she is entitled to her full right of dower conferred upon her by the laws of the State of Florida. Much has been said about the short duration of her marriage which, as above noted, lasted just over one month in period of time. The right to dower is not determined by the length of the marriage but is determined by virtue of the marital relationship itself. LARNA KATZ DONNER cannot be penalized by virtue of the short term of her marriage as she certainly had no possible knowledge at the time of the marriage whether SAMUEL DONNER would live 30 days or 15 years. She having timely elected to take against the Last Will and Testament of the decedent and to claim her dower rights under the laws of the State of Florida, she is entitled to do so and Judgment for Dower will be entered in her favor and Commissioners appointed to set off and allot the same. The finding of this Court, in the case of RUTH JEAN DONNER, Plaintiff, vs. PAUL B. ANTON and others, including LARNA KATZ DONNER, in the Circuit

Court of Dade County, General Jurisdiction Case No. 74-1716, wherein RUTH JEAN DONNER, by Final Judgment, was declared to be entitled to an equitable lien upon, and to be equitably subrogated to, the dower awarded to LARNA KATZ DONNER in the Estate of SAMUEL DONNER, deceased, as in said Judgment provided, does not diminish the award to LARNA KATZ DONNER of her full dower rights in the decedent's estate which rights are prior and paramount to the rights of all other contesting parties, subject only to the lien and subrogation above noted.

2. *RUTH JEAN DONNER,* by Final Judgment entered in *Donner vs. Anton,* Case No. 74-1716 above noted, has been declared to be a judgment creditor of the Estate of SAMUEL DONNER, deceased, to the extent and in the amounts in said Final Judgment noted and in that respect is entitled to the priority awarded general creditors of the estate of the decedent. To the extent that the Final Judgment entered in that cause against the Estate of SAMUEL DONNER, deceased, is not satisfied against general assets of the Estate of SAMUEL DONNER, deceased, after the award of Dower to LARNA KATZ DONNER has been fully set aside, RUTH JEAN DONNER is entitled to and has priority of satisfaction of her bequest of ONE MILLION DOLLARS, tax free, from the dower of LARNA KATZ DONNER so set aside in her behalf. RUTH JEAN DONNER has no priority over the claims of BEATRICE R. DONNER and EDWARD DAVID DONNER hereinafter set forth.

3. *BEATRICE R. DONNER.* The sole and only right of BEATRICE R. DONNER to claim against the estate of SAMUEL DONNER, deceased, is founded

upon the Separation Agreement she entered into with the decedent on March 2, 1959. She is not named as a legatee or beneficiary in the decedent's Last Will and Testament and, therefore, cannot take any part of his estate under and by virtue of the terms of the Will. She is entitled to exactly what her Separation Agreement provided for in her behalf, no more and no less. The Separation Agreement provided that the decedent would by his Last Will and Testament devise to BEATRICE R. DONNER outright one-third of his net estate which is the equivalent of an intestate share of a wife in accordance with the laws of the State of New York then in force and effect. Actually this provision for BEATRICE did not assure or guarantee that she would receive anything from his estate even if he had incorporated such a provision in his Last Will and Testament. MR. DONNER could have died without sufficient assets to have a net estate. By the terms of the Agreement, she was to receive only one-third (⅓) of his net distributable estate and that is exactly what she is entitled to.

There has been considerable discussion and evidence with respect to whether BEATRICE R. DONNER would be a creditor or a legatee of SAMUEL DONNER's estate under the law of the State of New York. There is ample authority in New York law that she would take of his estate to the same extent as if she were a legatee as provided in the Separation Agreement. It makes no difference whether she is labeled a creditor or legatee. She derives her right under the contract and not under the Will, and her cause of action is for breach of that contract or agreement and her relief by way of damages is measured by that which she would have received had the Agreement been compiled with. See

Landers v. Sherwin, 261 So.2d 542, 543 (Fla. App. 4th 1972) where the Court said:

> "Appellee's father clearly breached his agreement, and without question, appellee as a third party beneficiary had a cause of action for her damages. Had she elected to file such a suit (which she did not) she would have been in the category of a general creditor of the estate as to whom F.S. Section 733.16, F.S.A. would be applicable. Cooey v. Cooey, 1938, 132 Fla. 716, 182 So. 202. Apparently in hopes of avoiding the effect of her noncompliance with F.S. Section 733.16, F.S.A., appellee elected as her remedy to have a court of equity impose a constructive trust for her benefit upon the property which, according to the terms of the agreement, was to be devised by Will."

This rule of law applied by the Appellate Court of this state applies equally to RUTH JEAN DONNER and to EDWARD DAVID DONNER with respect to their claims.

The Summary Judgment in behalf of BEATRICE R. DONNER entered in Case No. 73-5012 above quoted which was affirmed upon appeal determined the validity of the Separation Agreement in so far as it was a contract to make a Will and the Summary Judgment there entered constitued a money judgment against the Estate of SAMUEL DONNER, deceased, the dollar amount of which is to be determined by fixing the sum which will constitute one-third (1/3) of the net distributable estate of the decedent in accordance with the laws of the State of New York at the time the Agreement

was executed. To the extent of that dollar amount, BEATRICE R. DONNER is a judgment creditor of the Estate of SAMUEL DONNER, deceased.

The Court has heard extensive testimony from highly regarded New York attorneys having expertise in this area of the law who have testified that under the law of the State of New York at the time referred to, one-third (1/3) of the net distributable estate of the decedent was the gross estate, less the debts of the decedent, less the cost of administration, less funeral expenses, and less that amount that would be award to a surviving spouse of the decedent, but not estate or inheritance taxes. Applying that formula to the gross estate of SAMUEL DONNER, deceased, one-third of that remaining after the deductions aforesaid is the dollar amount of the judgment in behalf of BEATRICE R. DONNER that she is entitled to as a judgment creditor of the estate. To the extent of her judgment she has no priority over the judgment creditor status of RUTH JEAN DONNER or the judgment creditor status of EDWARD DAVID DONNER. BEATRICE R. DONNER has no priority over the dower rights of LARNA KATZ DONNER.

4. *EDWARD DAVID DONNER.* The claim of EDWARD DAVID DONNER against the estate of the decedent is also to be determined by the obligations of the decedent as expressed in the Separation Agreement of March 2, 1959. As has been above noted, SAMUEL DONNER, by his Agreement, was obligated to bequeath to his son one-third of his net estate. The agreement further provided that the decedent (husband) reserved the right to devise and bequeath this share of his estate in whole or in part to trustees designated by

the husband. SAMUEL DONNER did not bequeath one-third of his net estate to his son by his Last Will and Testament but he did bequeath $200,000.00 to trustees for the benefit of EDWARD DAVID DONNER as in said Will set forth. To that extent he honored and complied with his obligation to his son as contained in the Separation Agreement.

EDWARD DAVID DONNER is entitled to exactly that benefit that the Separation Agreement between husband and wife conferred upon him as the son, no more and no less: one-third of the net estate of SAMUEL DONNER, deceased, to be determined as the gross estate, less the debts of the decedent, less the cost of administration, less funeral expenses, less estate or inheritance taxes and less the dower or elective share of the surviving spouse of the decedent. In the Summary Judgement, Case No. 73-5012, EDWARD DAVID DONNER was awarded a money judgment against the estate of the decedent to the extent of one-third of his net estate, both real and personal. The dollar amount of that judgment is to be determined by the formula above stated and to that extent EDWARD DAVID DONNER is a judgment creditor of the estate of the decedent. In the event that the trust in the sum of $200,000.00 provided for the son, EDWARD DAVID DONNER, in the Last Will and Testament should be funded, then said sum would be credited against the money judgment aforesaid towards the satisfaction thereof. EDWARD DAVID DONNER has no priority over the claim of LARNA KATZ DONNER for dower. He stands on equal footing with RUTH JEAN DONNER and BEATRICE R. DONNER as judgment creditors of the Estate of SAMUEL DONNER, deceased.

The premises considered, it is now:

ORDERED AND ADJUDGED that the priorities in this cause as between the parties aforesaid be and the same is hereby determined to be as follows:

1. The dower rights of LARNA KATZ DONNER is of first priority.

2. The rights of RUTH JEAN DONNER, BEATRICE R. DONNER, and EDWARD DAVID DONNER as judgment creditors of the Estate of SAMUEL DONNER, deceased, are of equal priority.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 12th day of October, 1976.

/s/ Frank B. Dowling
CIRCUIT JUDGE

Copies furnished to:

Heller & Kaplan, Esqs.
Lewis Horwitz, Esq., of Broad & Cassel, Esqs.
Joseph E. Price, Esq., Abrams, Anton, Robbins, Resnick & Schneider, P.A.
Amy Linda Steele, Esq.
Paul Louis, Esq., Sinclair, Louis & Siegel, Esqs.
Phillip Schiff, Esq., Dubbin, Schiff, Berman & Dubbin, Esqs.

In re ESTATE of Samuel DONNER,
Deceased.

Edward David DONNER, Larna Katz Donner, Beatrice Donner, and Ruth Jean Donner,
Appellants,

v.

Paul B. ANTON et al.,
Appellees.

Nos. 76-2091, 76-2092, 76-2106 and 76-2232.

District Court of Appeal of Florida,
Third District.

Oct. 3, 1978.

Rehearing Denied Nov. 22, 1978.

In a probate proceeding, the Circuit Court for Dade County, Frank B. Dowling, J., entered order determining nature and priority of dower and other claims filed against estate, and surviving spouse and other claimants appealed. The District Court of Appeal, Hubbard, J., held that: (1) no equitable lien or encumbrance of any kind could be imposed upon surviving spouse's dower, which was prior and paramount to claims of all contesting parties; (2) former wife was judgment creditor against estate for amount in which testator was in arrearage at time of his death on alimony and other payments due prior divorce decree; (3) former wife was

legatee of estate on $1,000,000 legacy bequeathed her under will, and (4) testator's first wife and adopted son had to be treated just as if testator had made legacies to them in his will that he had previously contracted that he would.

Affirmed in part and reversed in part.

1. Dower and Curtesy — 23

Surviving wife's dower was prior and paramount to claims against testator's estate, was unencumbered by any equitable lien in favor of testator's second wife, and had to be satisfied prior to satisfying any legatee or judgment creditor.

2. Dower and Curtesy — 23

Executors and Administrators — 219.7(1), 261

Testator's second wife was judgment creditor against estate for amount in which testator was in arrearage at time of his death on alimony and other payments due under prior divorce decree, subordinate only to surviving wife's right of dower.

3. Executors and Administrators — 261

As to her million dollar legacy under testator's will, testator's second wife was legatee of estate and took after surviving wife's dower but on equal basis with testator's first wife and adopted son, whose claims against estate were based on divorce settlement agreement in which testator contracted to will them certain

portions of estate, an agreement that he breached by failing to so provide in his last will and codicil.

4. Executors and Administrators — 261

Testator's first wife and son, whose claims against estate were based on divorce settlement agreement in which testator contracted to will them certain portions of his estate, an agreement that he breached by failing to so provide in his last will and codicil, and whose claims had previously been adjudicated valid and enforceable against estate, had to be treated the same as legatees of estate, and thus their claims had equal priority with other legacies but were subordinate to surviving wife's dower and second wife's claim for arrearages under divorce decree.

5. Judgment — 585(3)

Previous case which found that claims of testator's first wife and adopted son were valid and enforceable against estate decided validity, not priority, of their claims against estate and thus was not res judicata as to priority of such claims.

Dubbin, Schiff, Berkman & Dubbin, Miami, Broad & Cassel and Lewis I. Horwitz, Bay Harbor Island, Sinclair, Louis, Siegel & Heath, Heller & Kaplan, Miami, Amy Linda Steele, North Miami Beach, for appellants.

Abrams, Anton, Robbins, Resnick, Schneider & Mager and David L. Kline, Hollywood, Kelly, Black, Black & Kenny, Miami, for appellees.

Before HAVERFIELD, C. J., and HUBBART and KEHOE, JJ.

HUBBART, Judge.

This is a probate proceeding in which the trial court, after a full hearing, entered an order determining the nature and priority of dower and other claims filed against a decedent's estate in the Circuit Court for the Eleventh Judicial Circuit of Florida. The decedent's surviving spouse and the other claimants appeal.

A preliminary factual background for this case appears in our companion decision of *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I") (case nos. 76-1919, 76-2233; opinion filed Oct. 3, 1978). Additional relevant facts follow.

There are four principal claimants against the estate of the decedent Samuel Donner: Larna Donner, Ruth Donner, Beatrice Donner, and Edward Donner — all of whom are involved in this appeal. (1) Larna Donner [decedent's surviving spouse and third wife] has perfected a valid dower claim against the estate herein by electing to take dower against the decedent's last will and codicil pursuant to Section 731.35, Florida Statutes (1971), which was then in effect at the time of the decedent's death.

(2) Ruth Donner [decedent's second wife] has valid claim against the estate for $452,210.74 which represents the amount due and owing by the decedent at his death to Ruth for lump sum alimony arrearages and other bills which the decedent was required to pay under a prior divorce decree involving the decedent and Ruth

Donner. In addition, Ruth Donner claims an equitable lien on Larna Donner's dower to satisfy, if necessary, Ruth's one million dollar legacy under the decedent's last will due to an alleged fraud committed by Larna and the decedent in breaching a certain property settlement agreement between the decedent and Ruth Donner, as more fully discussed in *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I").

(3) Beatrice Donner [decedent's first wife] and (4) Edward Donner [decedent's adopted son] have valid claims against the estate herein for one third each of the decedent's net estate. These claims are based on a March 2, 1959, divorce settlement agreement later incorporated into a divorce decree involving the decedent and Beatrice Donner in which the decedent contracted to will Beatrice and Edward Donner the above portions of his estate, an agreement which he breached by failing to so provide in his last will and codicil. By separate suit previously instituted for specific performance on the above contract to make a will, these claims have been adjudicated valid and enforceable against the estate. *Donner v. Donner,* 302 So.2d 452 (Fla.3d DCA 1974), cert. denied 314 So.2d 151 (Fla.), appeal dismissed 314 So.2d 589 (Fla.1975).

After a full hearing, the trial court entered an order concluding that Larna Donner's dower rights were prior and paramount to all other claims subject only to an equitable lien in favor of Ruth Donner to satisfy, if necessary, Ruth's one million dollar legacy under the decedent's will. All other claimants were held to be judgment creditors of the estate of equal priority. Beatrice and Edward Donner's claims were determined to be one third of the net distributable estate.

I

We are first met with Larna Donner's contention that the trial court erred in its order on priorities in imposing an equitable lien upon her dower in favor of Ruth Donner. This is the same contention which was made in our companion decision of *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I"). In that case we held that this contention had merit and struck the equitable lien on Larna Donner's dower. For the reasons expressed in that decision, that portion of the order determining priorities herein which imposes an equitable lien upon Larna Donner's dower is also stricken. We hold that no equitable lien or encumbrance of any kind can be imposed upon the surviving spouse's dower under the facts of this case.

II

We now come to the central issue on this appeal, namely, the priority of the contesting parties' claims against the decedent's estate. Ruth, Beatrice and Edward Donner contend for differing reasons that the trial court erred in its order on priorities by treating them all as judgment creditors of equal priority against the estate behind Larna Donner's dower claim. On this aspect of the case, Larna Donner and the estate's personal representative, Paul B. Anton, urge that the trial court committed no error.

Ruth Donner contends that she is a judgment creditor against the estate and that her claims herein should come ahead of Beatrice and Edward Donner on the ground that the latter occupy the same position as legatees of the estate; she also urges that her claim is

prior to Larna Donner's dower. Beatrice and Edward Donner jointly contend that they are judgment creditors of the estate with priority over Larna Donner's dower and Ruth Donner's claims on the authority of *Donner v. Donner,* 302 So.2d 452 (Fla.3d DCA 1974), supra.

We hold that (1) Larna Donner's dower is prior and paramount to the claims of all the contesting parties on this appeal, which dower is unencumbered by any equitable lien in favor of Ruth Donner; (2) Ruth Donner is a judgment creditor against the estate in the amount of $452,210.74 which represents the amount the decedent was in arrearage at the time of his death on alimony and other payments due under the prior divorce decree involving the decedent and Ruth Donner; this claim comes after Ruth Donner's dower but prior to Beatrice and Edward Donner's claims; (3) Ruth Donner is a legatee of the estate on the one million dollar legacy bequeathed to her under the decedent's will; this claim comes after Larna Donner's dower and Ruth Donner's $452,210.74 claim but is of equal priority with Beatrice and Edward Donner's claims; (4) Beatrice and Edward Donner must be treated the same as legatees of the estate just as if the decedent had made the legacies to them in his will as he had previously contracted that he would; these claims come after Larna Donner's dower and Ruth Donner's $452,210.74 claim but are of equal priority with Ruth Donner's one million dollar legacy. The trial court's order on priorities on this aspect of the case is therefore affirmed in part and reversed in part as indicated above.

A

[1] For reasons more fully developed in our companion decision of *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I"), it is clear that Larna Donner's dower is prior and paramount to the claims of all the contesting parties on this appeal. Her dower is unencumbered by any equitable lien in favor of Ruth Donner and must come prior to satisfying any of the legatees or judgment creditors in this cause. *Henderson v. Usher,* 125 Fla. 709, 170 So. 846 (1936); *Goodwin v. King,* 31 Fla. 525, 13 So. 108 (1893)..

B

[2] Ruth Donner is clearly a judgment creditor against the decedent's estate in the amount of $452,210.74 because this represents the amount the decedent was in arrearage at the time of his death on alimony and other payments due under the prior divorce decree involving the decedent and Ruth Donner. Indeed, no party on this appeal seriously contests Ruth Donner's claim on this score. The trail court was accordingly correct in treating Ruth Donner as a judgment creditor of the estate as to the above-stated sum of money subordinate to Larna Donner's dower.

[3] By our companion decision in *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I"), Ruth Donner has no equitable lien against Larna Donner's dower to satisfy Ruth Donner's one million dollar legacy under the decedent's will. As to this legacy, absent the above equitable lien, Ruth Donner is clearly a legatee of the estate and must take after Larna Donner's dower but on an equal basis with Beatrice and Edward

Donner's claims. The trial court accordingly erred in treating Ruth Donner's legacy as a judgment claim against the estate.

C

[4] Beatrice and Edward Donner must be treated the same as legatees of the estate just as if the decedent made the legacies to them in his will as he had previously contracted to do in the 1959 separation agreement with Beatrice Donner. Surely, these two should not stand in a better position as creditors of the estate when, as here, the decedent failed to do that which he contracted to do. He contracted to make them legatees of the estate and when he failed to do so, both Beatrice and Edward Donner sued for specific performance on the contract. They prevailed in their suit; the judgment was affirmed on appeal. They are accordingly entitled to specific performance on the contract to make a will which in effect puts them in the same category as legatees of the estate. *Erwin v. Mark,* 105 Mont. 361, 73 P.2d 537 (1937); *In re Hoyt's Estate,* 174 Misc. 512, 21 N.Y.S.2d 107 (Sur.Ct.1940). As such, their claims must be treated as having equal priority with the one million dollar legacy of Ruth Donner, but of subordinate priority to Larna Donner's dower and Ruth Donner's $452,210.74 claim. The trial court therefore erred in treating the subject claims as judgment claims against the decedent's estate.

[5] We are unpersuaded by Beatrice and Edward Donner's contention that this court's decision in *Donner v. Donner,* 302 So.2d 452 (Fla.3d DCA 1974), supra, is res judicata in their favor on the priorities issues now before this court. That issue was in no way involved in

the prior *Donner* case and this court's opinion therein neither decided the issue nor intimated any views thereon. The case decided the validity, not the priority, of Beatrice and Edward Donner's claims against the decedent's estate herein.

III

We have carefully examined the remaining contentions of the appellants herein as against the record and the applicable law and find them to be without merit. We have particularly examined Beatrice Donner's contention that the trial court improperly computed her valid claim of a one third share in the decedent's net estate. Her cited authorities, however, do not convince us that any error was committed by the trial court on this aspect of the case.

The order appealed from is affirmed in part and reversed in part; the cause is remanded for further proceedings consistent with the holdings of this court as indicated above.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JUNE 21, 1979

CONSOLIDATED CASES

CASE NO. 55,781

District Court of Appeal, Third District
76-2091, 76-2092, 76-2106, 76-2232

In Re: Estate of SAMUEL DONNER

RUTH JEAN DONNER,
Petitioner,

v.

PAUL P. ANTON, et al.,
Respondents.

CASE NO. 55,782

District Court of Appeal, Third District
78-60

In Re: Estate of SAMUEL DONNER

EDWARD DAVID DONNER,
Petitioner,

v.

PAUL B. ANTON, etc.,
Respondent.

CASE NO. 55,783

District Court of Appeal, Third District
76-2091, 76-2092, 76-2106, 76-2232

In Re: Estate of SAMUEL DONNER

EDWARD DAVID DONNER,
Petitioner,

v.

PAUL ANTON, et al.,
Respondents.

CASE NO. 55,784

District Court of Appeal, Third District
76-2091, 76-2092, 76-2106, 76-2232

In Re: Estate of SAMUEL DONNER

BEATRICE ROSALIE DONNER,
Petitioner,

v.

PAUL B. ANTON, et al.,
Respondents.

CASE NO. 55,785

District Court of Appeal, Third District
76-1919, 76-2233

In Re: Estate of SAMUEL DONNER

RUTH JEAN DONNER,
Petitioner,

v.

LARNA KATZ DONNER, et al.,
Respondents.

These causes having heretofore been submitted to the Court of jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under

Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, Acting C.J., OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur

In Re: Estate of SAMUEL DONNER
Case Nos. 55,781 — 55, ____

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: Dublin Causseay
Deputy Clerk

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Frank B. Dowling, Judge
Hon. Richard P. Brinker, Clerk
Robert Golden, Esquire
Daniel Neal Heller
Paul B. Anton, Esquire
Lewis Horwitz, Esquire
Amy Linda Steele, Esquire
Philip Schiff, Esquire
Paul Louis, Esquire
Paul Siegel, Esquire
Vassar B. Carlson, Esquire

Bertha Claire Lee, Esquire
Kelly, Black, Black & Kenny
Mershon, Sawyer, Johnston, Dunwody & Cole
Meyer, Weiss, Rose & Arkin
Cushman & Cushman
Colson & Hicks

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION

Case No. 73-2814 (03)

IN RE: THE ESTATE OF
SAMUEL DONNER,
Deceased.

BEATRICE R. DONNER,
Appellant,

vs.

PAUL B. ANTON, WILLIAM I. DONNER, RUTH JEAN DONNER, LARNA KATZ DONNER, EDWARD DAVID DONNER,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Beatrice Donner, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Order of the Supreme Court of Florida denying certiorari entered in this action on June 21, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SINCLAIR, LOUIS, SIEGEL & HEATH
Attorneys for Appellant
1600 Alfred I. duPont Building
Miami, Florida 33131
(374-0544)

BY_____
PAUL SIEGEL

CERTIFICATE OF SERVICE

I, Paul Siegel, one of the attorneys for Beatrice R. Donner, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 12th day of September 1979, I served copies of the foregoing notice of appeal to the Supreme Court of the United States and on the several parties thereto as follows:

On, Paul B. Anton, William I. Donner, Ruth Jean Donner, Larna Katz Donner and Edward David Donner, Respondents, by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record, as follows:

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BY PAUL SIEGEL
PAUL SIEGEL

Supreme Court, U. S.
FILED
NOV 2 1979
MICHAEL RODAK, JR., CLERK

in the

Supreme Court
of the
United States

OCTOBER TERM, 1979

CASE NO. 79,458

BEATRICE R. DONNER,
Appellant,

vs.

PAUL B. ANTON, WILLIAM I. DONNER, RUTH JEAN DONNER, LARNA KATZ DONNER, EDWARD DAVID DONNER,
Appellees.

APPELLEE LARNA DONNER'S MOTION TO DISMISS AND MOTION TO AFFIRM

Lewis Horwitz Esq.
1108 Kane Concourse
Bay Harbor Islands, Florida 33154
Attorney for Appellee
LARNA KATZ DONNER

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Rule 16, Rules of the Supreme Court 1

Appellee LARNA DONNER (LARNA) hereby makes this motion to affirm united in the alternative with a motion to dismiss pursuant to Rule 16 of this court.

The grounds of these motions are that the appeal from the state court does not present a substantial federal question; the federal question was not expressly passed on, and the judgment rests on an adequate non-federal basis. LARNA also wishes to present as a basis for the motion to dismiss and, in the alternative, to affirm that the discrimination alleged by the appellant (BEATRICE) is founded upon a reasonable distinction or difference in state policy not in conflict with the federal constitution.

STATEMENT OF THE CASE

The case of *In Re Estate of Donner v. Donner,* 364 So.2d 742 (Fla. 3d DCA 1978), cert. den., ____ So.2d ____ (Fla. 1979) (Larna's Appendix 1-31) is a reported opinion of the court below which must be read in conjunction with the opinion alleged by BEATRICE (page 1 of her brief) to be the only reported opinion. The captions of both opinions are the same and both are a part of a series of opinions rendered the same day in the court below. LARNA adopts the statements of facts contained in both those opinions reported in 364 So.2d 742 and 364 So.2d 753, the former being in LARNA's Appendix 1-31, and the latter being in BEATRICE's Appendix, 19-28.

The material facts are simply that LARNA is the widow of the deceased (SAM) and BEATRICE is the first of his two ex-wives who had a property settlement

agreement with SAM at the time she divorced him years before his marriage to LARNA. SAM's marriage to his second wife, RUTH, intervened between BEATRICE's divorce and SAM's marriage to LARNA.

LARNA disagrees with BEATRICE's statement of the case because it contains immaterial statements and statements not of record.

BEATRICE does not cite any portion of the record which establishes that she ever suffered from cancer or that her health is poor. In any event, it is completely immaterial.

The various lengths of time the various wives were married to the deceased are immaterial. Whether or not LARNA has any funds of her own outside of the estate is immaterial.

What the estate will receive during the course of administration is not known. Whether or not it will be 9 million dollars is not known, and the amounts of the distribution are not known. BEATRICE does not cite any part of the record for the figures she gives, and at most they are conjectural.

Estate accountants have calculated projections and estimates based on many different possibilities. There is no proof as to the dollar value of LARNA's dower because much of it is an interest in partnerships and corporations which own real estate.

Whether or not any portion of BEATRICE's legacy is "in jeopardy", and whether or not RUTH will receive substantially less than her legacy will not be known

until there is a final determination of the amounts of the estate taxes, income taxes, and administration expenses and until unliquidated assets have been disposed of. The dollar amounts of these items have not yet been determined.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The constitutional question was presented by Beatrice as follows:

> (b) That this Court declare Section 731.34 of the Florida Statutes unconstitutional to the extent that said statute would purport to give Larna Katz Donner any greater right or benefit in the estate of Samuel Donner than that which Beatrice is ultimately to receive. If Larna receives more from this estate than does Beatrice under Section 731.34, the statute would be violative of Article I, Sections 2, 9 and 10 of the Florida Constitution, and Article I, Section 10 and the due process and equal protection clauses of Amendment XIV of the United States Constitution. In re Estate of Humphreys, 299 So.2d 595, 598 (Fla. 1974)(dissenting opinion). (Beatrice Appendix 2)

This challenge does not present a substantial constitutional question. *Zucht v. King*, 260 U.S. 174, 177 (1922). BEATRICE does not challenge the validity of the dower statute, nor does she question the general effect of the statute's application. BEATRICE only questions the dower statute to the extent it might possibly give LARNA a share in Sam's estate which

would adversely affect BEATRICE's share or be greater than BEATRICE's share.

In the Donner estate and in any estate where a deceased husband by will devises substantial property to his wife, it is not actually known until administration of the estate is finally completed: (1) whether or not the value of the dower rights exceeds the value of devises to the widow or (2) whether or not the widow's election to take dower affects the rights of other beneficiaries of the estate, whether legatees or creditors, or (3) whether the widow eventually will get more or less than other beneficiaries. Whether or not other beneficiaries of the estate are adversely affected depends on many factors extrinsic of the dower statute.

THE FEDERAL QUESTION WAS NOT EXPRESSLY PASSED ON

The decision of the Supreme Court of Florida appealed from does not specifically refer to the constitutionality of the applicable Florida dower statute. The decision was based upon its constitutionality without specifically mentioning it.

THE ALLEGED DISCRIMINATION IS FOUNDED UPON A REASONABLE DISTINCTION AND THE JUDGMENT APPEALED RESTS ON AN ADEQUATE NON-FEDERAL BASIS

LARNA objects to BEATRICE's presentation of the question on the ground that it is saturated with immaterial matters. LARNA submits the proper question presented is:

DID THE STATUTORY CLASSIFICATION IN A DOWER STATUTE, NOW REPEALED, GRANTING A SURVIVING WIFE THE RIGHT TO ELECT AGAINST THE WILL OF HER DECEASED HUSBAND AND TO OBTAIN A DOWER SHARE OF THE ESTATE, CONSTITUTE A REASONABLE DISTINCTION OR DIFFERENCE BETWEEN THE WIDOW AND EX-WIVES WHO IN THE DISTANT PAST HAD DIVORCED THE DECEASED AND OBTAINED LARGE ALIMONY AND PROPERTY SETTLEMENT AGREEMENTS FOR THEIR BENEFIT AS A PART OF THE DIVORCE PROCEEDINGS WHICH THEY HAD INSTITUTED?

The question presented by BEATRICE is not proper because it is not known whether or not dower will constitute "the vast bulk of" decedant's estate. The administration of the estate is not concluded, nor has there been a final determination of the amount of either the estate taxes or the income taxes.

The relative times during which the decedent was married to his various wives is immaterial. Whether or not the dower is "at the expense of two former wives" will not be known until the administrative expenses, the estate taxes, and the income taxes are known.

In the meantime, the two former wives have been distributed hundreds of thousands of dollars from the estate as a result of their property settlement agreements arising out of the divorce proceedings they themselves had initiated.

BEATRICE argues that the dower statute is discriminatory against former wives because the statutory classification of widow has no relation to the object of the legislation.

The purpose of the dower statute is to provide support for the widow from such property as the husband may die possessed of. *Adams v. Adams*, 2 So.2d 855 (Fla. 1941). The class affected by the dower statute is clearly defined, surviving wives. The statute treats all persons within that class the same. It does not discriminate on the basis of wealth or length of marriage.

BEATRICE argues that the statute is discriminatory in that it results in the differing treatment of surviving wives and former wives. Inequality of treatment is inevitable whenever a statute confers a right or obligation upon a particular class. The test therefore is not whether this statute distinguishes between classes, but whether such a distinction is reasonable. *Kahn v. Shevin*, 416 U.S. 351 (1974).

This court has found numerous statutory classifications favoring a particular group to be based upon a reasonable distinction and not in contravention with the federal constitution. In *Parham v. Hughes*, ___ U.S. ___, 99 S.Ct. 1742 (1979), it was mothers of an illegitimate child and fathers who had legitimated a child if there was no mother versus fathers who had not legitimated a child as to the right to maintain a wrongful death action. In *Califano v. Webster*, 430 U.S. 313 (1977), it was male wage earners versus female wage earners in the computation of an individual's average monthly wage and corresponding amount of monthly old

age benefits. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), it was male naval officers versus female officers in the number of years of commissioned service before a mandatory discharge of want of promotion. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), it was disabilities resulting from normal pregnancies versus disabilities resulting from abnormal and involuntarily complicated pregnancies in insurance coverage.

BEATRICE bases her argument mainly on sex discrimination cases. In *Caban v. Mohammed*, ___U.S.___, 99 S.Ct. 1760 (1979), there was discrimination between unmarried mothers and unmarried fathers in adoption proceedings. In *Orr v. Orr*,___U.S.___, 99 S.Ct. 1102 (1979), it was husbands versus wives in alimony provisions. In *Reed v. Reed*, 404 U.S. 71 (1971), it was men versus women as administrators of a deceased's estate. These cases, because they were decided upon the basis of sex discrimination, are inapposite the case at bar.

BEATRICE relies on the following cases where the discrimination was other than sex: In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), it was sale to married persons versus sale to unmarried persons of contraceptives. In *Stanley v. Illinois*, 405 U.S. 645 (1972), it was wed fathers versus unwed fathers with respect to the right to a hearing on their fitness as parents. These statutory classifications, because they were arbitrary, unreasonable and resulted in differing treatment of people similarly circumstanced, were held unconstitutional. The designation of widow in the former dower statute does not have that result because widows and ex-wives are not people similarly circumstanced.

In *Kahn v. Shevin*, 416 U.S. 351 (1974), BEATRICE cites the dissenting opinion. The majority opinion favors LARNA's position. The Florida statute there involved gave widows a $500 exemption from property taxation but did not allow the same exemption to widowers. This court held that the Florida statute did not violate the equal protection clause because in the state tax law the discrimination was founded upon a reasonable distinction not in conflict with the federal constitution.

The distinction between a widow and former wives in the dower statute is reasonable. The former wives at the time of their divorce and upon entering into the property settlement agreements were granted the opportunity to obtain means and sustenance for their support from the deceased. The dower statute endeavors to protect the widow by providing that she, too, may be insured of the means and sustenance for her support by the deceased. How except by dower can she be protected against a husband who did not provide for her in his will?

CONCLUSION

Appellee Larna Donner's motion to affirm united in the alternative with a motion to dismiss should be granted.

Respectfully submitted,

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Bay Harbor Islands,
Florida
Attorney for Appellee

Appendix

In re ESTATE of Samuel DONNER,
Deceased.

Larna Katz DONNER,
Appellant,

v.

Paul B. ANTON et al.,
Appellees.

Ruth Jean DONNER,
Appellant,

v.

Paul B. ANTON et al.,
Appellees.

Nos. 76-1919, 76-2233.

District Court of Appeal of Florida,
Third District.

Oct. 3, 1978.

Rehearing Denied Nov. 22, 1978.

Action was brought by former wife against executors of estate and widow for damages and other equitable relief for breach of contract and for fraud. The Circuit Court, Dade County, Frank B. Dowling, J., upheld former wife's claim to $1,000,000 tax-free bequest made pursuant to settlement agreement entered into with her former husband, and imposed

"equitable lien" in favor of bequest upon widow, and appeals were consolidated. The District Court of Appeal, Kehoe, J., held that: (1) widow was entitled to her full dower right as provided by law at time she elected to take dower; (2) testator's settlement agreement with his former wife was invalid insofar as it purported to require widow to waive her right to dower, and (3) equitable lien imposed upon dower in favor of former wife was invalid and of no effect.

Affirmed in part, reversed in part and remanded for further proceedings.

1. Appeal and Error — 931(1), 1008.1(5), 1010.2

Trial court's findings of fact came to District Court of Appeal clothed with presumption of correctness and would not be disturbed upon appellate review absent showing that they were clearly erroneous or totally without any substantial evidentiary support.

2. Appeal and Error — 842(2)

District Court of Appeal is not bound by trial court's legal conclusions when those conclusions conflict with established law.

3. Fraud — 50

To establish fraud attributable to testator's widow, it had to be shown that testator's former wife was defrauded by testator's willful breach of settlement agreement, that widow was aware of restrictions imposed upon her by that agreement and considered

herself bound by it, and that she intended to join in to defraud former wife of her promised bequest.

4. Fraud — 12

Testator may have never intended to abide by his agreement with former wife to enter into antenuptial agreement with any future woman he might marry in which his future wife would waive her dower to extent it might interfere with $1,000,000 bequest due former wife, but his willful breach of contract alone, without more, was insufficient to constitute fraud; moreover, even had he promised former wife that he would require his future spouse to waive dower as inducement to entice her to accept settlement agreement, this still would not amount to fraud in the legal sense.

5. Fraud — 30

Testator's breach of settlement agreement obligating him to enter into antenuptial agreement with any future woman he might marry in which his future wife would waive her dower to extent it might interfere with $1,000,000 bequest to former wife, could not, regardless of his culpability, have been "passed on" to his widow, who was not a party to settlement agreement and had no contractual relationship whatsoever with former wife, and who made no promises to former wife or engaged in any misrepresentations, and thus she could not be said to have breached settlement agreement with former wife, a necessary prerequisite to finding that she joined with testator to perpetrate fraud on former wife.

6. Contracts — 188

Ordinarily, a contract cannot bind one who is not a party thereto since to create a valid contract there must be a reciprocal assent to a certain and definite proposition.

7. Fraud — 30

Testator's widow had no duty to inquire into effect upon her impending antenuptial agreement with testator of his settlement agreement with his former wife, obligating him to enter into antenuptial agreement with any future woman he might marry in which his future wife would waive her dower to extent it might interfere with $1,000,000 bequest to former wife, and without it she could not be "charged with knowledge" of that agreement, and thus, without some knowledge of contents of settlement agreement, she could not have joined in to defraud former wife of her promised bequest.

8. Notice — 1

Without duty to inquire, negligent ignorance no longer has same effect in law as actual knowledge.

9. Fraud — 4

In addition to knowledge, second element necessary to establish actionable fraud is intent.

10. Fraud — 4

Where nothing evidenced any indication of intent on part of testator's widow to defraud former wife of her

expectancy under testator's will and settlement agreement, conclusion that she joined in testator's allegedly fraudulent activity had to fail.

11. Dower and Curtesy — 29,31

"Dower" is right of wife granted to her by law and vests on death of husband.

See publication Words and Phrases for other judicial constructions and definitions.

12. Dower and Curtesy — 30

Inchoate right of dower is purely prerogative of legislature which may modify or abolish it at will.

13. Dower and Curtesy — 29

Dower is personal right which may be exercised only by widow.

14. Dower and Curtesy — 38

Upon vesting at death of spouse, dower is not subject to, affected by or altered by acts of husband, including, but not limited to, contracts which he may have entered into without wife's actual knowledge or consent.

15. Dower and Curtesy — 38

Testator's widow could not be deprived of any portion of her dower as result of unilateral action of testator in contracting away that right in property

settlement agreement with former wife but, rather, her dower right was paramount over restrictions made in settlement agreement.

16. Dower and Curtesy — 38
Liens — 7

Testator's widow's dower right could only be taken away or modified by her voluntary consent, by her own act or by statute, and thus engrafting of equitable lien upon dower in order to insure that former wife would receive full amount of $1,000,000 bequest made to her in testator's will was inappropriate.

17. Liens — 7

"Equitable lien" is generally a fixture of property law imposed when complainant has no adequate remedy at law and without it, injustice would result; it is a right of special nature over a particular property that may arise from written contract which shows an intention to charge particular property with debt or obligation, or it may arise out of general considerations of right and justice as applied to relations of parties and circumstances of their dealings in particular case.

See publication Words and Phrases for other judicial constructions and definitions.

18. Marriage — 40(10)

Party attacking legality of last marriage has heavy burden of rebutting presumption that such marriage is valid.

19. Marriage — 42

In light of former wife's failure to sustain her required burden of proof on issue of fraud, testator's wife at time of his death was his lawful widow and was entitled to all widow's rights under law; 34-day duration of her marriage was irrelevant to issue of its validity.

20. Divorce — 288

Statutory provision permitting attorney fees in dissolution of marriage proceedings did not authorize payment of such fees to former wife in her action for damages and equitable relief for breach of contract and for fraud since suit was not brought under dissolution chapter. West's F.S.A. §§ 61.001 et seq., 61.16.

Broad & Cassel and Lewis I. Horwitz, Bay Harbor Island, for Larna Katz Donner.

Heller & Kaplan, Robert Golden and Daniel Heller, Miami, for Ruth Jean Donner.

Abrams, Anton, Robbins, Resnick & Schneider and David L. Kline, Hollywood, Amy Linda Steele, North Miami Beach, for appellees.

Before HAVERFIELD, C. J., and HUBBART and KEHOE, JJ.

KEHOE, Judge.

This is a consolidated appeal taken from a final judgment entered after a non-jury trial conducted before the court below. The final judgment upheld Ruth

Jean Donner's (appellant in appeal No. 76-2233, appellee in appeal No. 76-1919) claim to a $1,000,000 tax-free bequest made pursuant to a settlement agreement entered into with her former husband, Samuel Donner, and implemented by the provisions of his will probated after his death. The final judgment under review also imposed an "equitable lien" in favor of Ruth Jean Donner's $1,000,000 bequest upon Larna Katz Donner (appellant in appeal No. 76-1919, appellee in appeal No. 76-2233), Samuel Donner's third wife and widow, to the extent that Larna Katz Donner's dower claim reduces the amount of Ruth Jean Donner's bequest.

This action was precipitated by the death of Samuel Donner on January 25, 1973. He died leaving behind an estate valued in excess of $7 million dollars. A will contest ensued involving numerous parties and a complicated probate proceeding below. In addition to the litigation surrounding the probate of the will itself, several other related lawsuits arose out of peripheral matters concerning the administration and distribution of the estate. Multiple appeals have been taken from the various orders entered by the court below during the probate of the estate and in disposing of the related matters. This consolidated appeal is taken from a final judgment disposing of one such related matter connected with, but not a part of, the probate of the

Donner Estate. Facts pertinent to this separate consolidated appeal are more fully explained below.[1]

This action was originally brought by Ruth Jean Donner for damages and other equitable relief allegedly incurred for breach of contract and for fraud. The defendants below were the executors of the Donner Estate (the estate) and Samuel Donner's widow, Larna Katz Donner [for the sake of brevity the parties and decedent will be referred to as Ruth, Larna and Sam].

After a non-jury trial on the merits, the court below entered a final judgment containing extensive findings of fact and ordered *inter alia* as follows:

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[1]Our opinion decides only matters raised in this particular consolidated appeal. We have also today released separate opinions deciding a number of other pending appeals arising out of the probate of the Donner estate. These "Donner appeals" have been combined by this court into several distinct consolidated groups of appeals designed to facilitate their resolution. For convenience of reference, the appeals have been designated as follows:

DONNER I	76-1919 76-2233	364 So.2d 742
DONNER II	76-2091 76-2092 76-2106 76-2232	364 So.2d 753
DONNER III	76-1902 76-2196	364 So.2d 757
DONNER IV	76-1078	364 So.2d 758
DONNER V	77-75	364 So.2d 761
DONNER VI	78-60	364 So.2d 763

Reference will be made throughout these opinions to "Donner I," "Donner II," etc.

(1) That Ruth recover from the Donner Estate the sum of $452,210.74 in satisfaction of her claims against the estate;

(2) That Ruth recover from the estate such further sum as shall be in an amount equal to the deficiency, if any, in full satisfaction of the $1,000,000 bequest provided for by Sam's will pursuant to the terms of his settlement agreement with Ruth;

(3) That Ruth recover from Larna by way of equitable lien upon the dower award due to Larna an amount equal to the sum that Larna's dower claim reduces Ruth's $1,000,000 bequest, should the estate prove unable to satisfy her (Ruth's) claim in full.

Both Ruth and Larna appeal the final judgment.[2] Ruth appeals the entire judgment contending that: (1) the trial court failed to set aside her divorce from Samuel Donner on the grounds of fraud and declare her to be Sam's true widow; (2) the trial court erred by requiring her to pay her own attorneys' fees and costs; and (3) the trial court erred by relieving the estate from any obligation to pay her attorneys' fees in these proceedings to enforce the final judgment dissolving her marriage to Sam. Larna only appeals from that part of the final judgment which provided for an equitable lien against her dower. Both of these appeals have been consolidated for all appellate purposes.

[2]The estate, through its Executors, also filed an appeal from the final judgment (76-2034). That appeal has been voluntarily dismissed.

We reverse in part and hold: (1) that Larna is Samuel Donner's lawful widow; (2) that she is entitled to her full dower right as provided by law at the time she elected to take dower; (3) that the settlement agreement between Ruth and Sam was invalid insofar as it purported to require Larna to waive her right to dower; and (4) that the equitable lien imposed upon Larna's dower in favor of Ruth is invalid and of no effect.

The facts germane to this appeal may be briefly summarized as follows:[3]

Sam died at sea aboard a cruise ship while honeymooning with his new bride, Larna. He died testate leaving behind a will and a codicil thereto, and several interested parties with sizable claims against the estate. A petition for probate of his estate was filed soon thereafter in accordance with the provisions of the Florida Probate Code then in effect.[4] At his death, Sam left behind a sizable estate conservatively valued in excess of $7 million dollars and consisting largely of a complicated portfolio of corporate and personal interests in real estate and various other business ventures. Sam was a large scale developer who operated through

[3]The trial court has helpfully provided us with extensive findings of fact. We have fully examined this voluminous record, however, for all facts pertinent to a proper disposition of this appeal.

[4]§732.23, Fla.Stat. (1971). This section has since been repealed and replaced by an entirely new probate code effective January 1, 1976 [Chapters 731 through 735, Fla.Stat. (1977)]. See Ch. 74-106, §§3 and 4, Laws of Fla., as amended Ch. 75-220, §113, Laws of Fla. This consolidated appeal is governed by the provisions of the Florida Probate Code in effect prior to January 1, 1976.

various corporate and partnership entities to construct numerous large condominium projects in South Florida. Through his own efforts and business acumen, he acquired sizable financial interests in a number of these developed properties. These interests now comprise the bulk of his estate. The estate has since been continously involved in litigation.[5]

Prior to his marriage to Larna in 1972, Sam had been married to Ruth Donner for approximately 13 years. Ruth was Sam's second wife.[6] Ruth and Sam separated in September 1971, and a final judgment dissolving their marriage was entered on October 10, 1972. This final judgment dissolved the existing marriage and ratified a settlement agreement previously entered into between Sam and Ruth on August 4, 1972, whereby Sam promised to leave Ruth a $1 million tax-

[5]Sam's death sparked a bitter will contest among the various interested parties to the estate that continues unabated after five years. At his death, Sam left a widow (Larna), two ex-wives (Ruth and Beatrice Donner) and an adopted son of his first marriage (Edward). All of these interested parties have established claims against the estate. Priority on the various claims has been determined by the court below and is the subject of a separate consolidated appeal ("Donner II"). By our companion decision released today, *Donner v. Anton*, 364 So.2d 753 (Fla.3d DCA 1978), we have reversed the order on priorities in part and remanded the case for further proceedings below.

[6]Sam's first wife, Beatrice R. Donner, is not a party to this appeal though not for want of trying. She has vigorously attempted to intervene in this action, both here and below, but she has not been permitted to do so. She is however a party in several other companion opinions released this date. *See Donner v. Anton*, 364 So.2d 753 (Fla.3d DCA 1978) ("Donner II"); *Adler v. Donner*, 364 So.2d 758 (Fla. 3d DCA 1978) ("Donner IV"); and *Donner v. Donner*, 364 So.2d 761 (Fla.3d DCA 1978) ("Donner V").

free bequest in his will, and obligated him to enter into an antenuptial agreement with any future woman he might marry in which his future wife would waive her dower to the extent it might interfere with Ruth's bequest.[7]

Sam and Larna began dating even before his separation from Ruth in 1971. They had met years before and had resumed their acquaintance sometime after Larna, by then divorced, began working as a rental agent with Galahad Hall Associates, a Donner enterprise. As early as 1968 Ruth accused Larna of alienating Sam's affection for her. The trial court found as fact that at the time of the execution of the settlement agreement of August 4, 1972, Sam and Larna were seeing each other on almost a daily basis and the dissolution of the marriage sought by Sam was for the purpose of marrying Larna.

[7]The settlement agreement between Sam and Ruth provided as follows:

> "8. *WILL PROVISION.* The Husband shall, as part of the settlement, promptly make, execute, and keep in effect until his death, a will under which the Husband shall devise and bequeath unto his Wife, if living, the sum of One Million ($1,000,000.00) Dollars, free of all estate and inheritance taxes. Such bequest shall be payable regardless of whether or not the Wife shall have remarried prior to the death of the Husband. In the event the Husband shall remarry, the Husband agrees that he will, prior to any such marriage, *enter into an antenuptial agreement whereby his intended wife will relinquish any claim of dower or right of inheritance which would, but for such antenuptial agreement, diminish the sum to be received by the present wife under the provisions of this paragraph.*" [Emphasis supplied]

On October 30, 1972, some 20 days after the final judgment dissolving his marriage to Ruth and notwithstanding the contrary provisions of the settlement agreement of August 4, 1972, Sam entered into an antenuptial agreement with Larna wherein it was provided:

> ". . . [T]hat LARNA does not release or relinquish any and all claims and rights of any kind, nature and description that she may acquire by reason of the marriage in SAM's property or estate, under the present or future laws of the State of Florida or any jurisdiction, including, but without limitation: (a) the right to elect to take against any present or future Last Will and Testament or Codicil of the other party. . . ."

Sam married Larna on December 22, 1972 in Ft. Lauderdale. Thirty-four days later he died of a heart attack while vacationing aboard a cruise ship. In his will Sam left the promised one million dollars to Ruth.[8] By a codicil to his will executed after his marriage on January 4, 1973, Sam made his then wife, Larna, his sole residual beneficiary.[9] Later, during the probate of the estate,

[8]Sam's will of November 24, 1972, filed for probate stated:

"I hereby make the following specific bequests . . .

(c) To my former wife, Ruth Jean Donner, the sum of One Million ($1,000,000) Dollars, if she survives me."

[9]"I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of whatever nature and wherever situate, including without limitation, all property over which I may have the power of appointment, all lapsed legacies and bequests, to my beloved wife, Larna, if she survives me."

Larna chose not to take under the will and filed her election to take dower pursuant to Section 731.35, Florida Statutes (1971).[10]

Ruth filed this lawsuit against Larna and the estate seeking equitable relief for damages sustained by her by virtue of the alleged breach of her settlement agreement with Sam. She charged that Sam and Larna conspired to fraudently deprive her of her expectancy under that agreement by entering immediately into an antenuptial agreement expressly contrary to the provisions of the settlement agreement. Ruth further contended that Sam's marriage to Larna was so permeated by this fraud that it was a nullity and that she should be declared Sam's lawful widow.

The trial court, in its lengthy final judgment, made certain factual findings and legal conclusions pertinent to the issues facing this court. It found:

> (1) That at the time of the execution of the antenuptial agreement between Larna and Sam, Larna knew that a property settlement agreement had been entered into between Sam and Ruth [no specific finding was made that Larna had actual knowledge of the contents of that agreement];

[10]This section was also repealed by Ch. 74-106, Laws of Fla. Larna's election to take dower, filed on December 10, 1974, was properly made pursuant to the Probate Code in effect at the time of her husband's death. *In Re: Estate of Humphreys,* 299 So.2d 595 (Fla. 1974).

Under the new Florida Probate Code, effective January 1, 1976, dower is expressly abolished [§732.111, Fla.Stat. (1977)] and replaced by the surviving spouse's right to take an elective share [§732.201, Fla.Stat. (1977)].

(2) By virtue of her previous personal experience,[11] Larna was *charged with knowledge* of the provisions of Sam's divorce decree and its accompanying settlement agreement with Ruth;

(3) That Sam, willfully, knowingly and with the conscious intent to do so, breached his settlement agreement with Ruth by knowingly entering into an antenuptial agreement with Larna only days later that was in direct contradiction of, and in violation of, the settlement agreement;

(4) That Sam's execution of the antenuptial agreement, despite the clear provisions of the settlement agreement to the contrary, was sufficient to constitute a fraud upon Ruth;

(5) That Larna, by virtue of her election to take dower, joined in the fraud perpetrated upon Ruth.

The trial court concluded that Ruth was entitled to judgment for the damages she sustained by Sam's willful breach of the settlement agreement and by the fraudulent actions of Sam and Larna entering into an antenuptial agreement which had as its specific purpose the reaffirmation of Larna's dower right notwithstanding the contrary provisions in the settlement agreement. The trial court ruled that Ruth was entitled to her $1 million tax-free bequest out of the proceeds of the estate. Should Larna's election to take

[11]Larna, a divorcee, had previously entered into a property settlement agreement with her former husband.

dower diminish the assets of the estate to the extent that Ruth would not receive the full amount of her bequest, then the court imposed an equitable lien on Larna's dower claim to the extent of any deficiency.[12]

[12]The decretal portion of the final judgment reads as follows:

"The premises considered, it is:

ORDERED AND ADJUDGED that:

(1) Plaintiff, RUTH JEAN DONNER, be and she is hereby entitled to and shall recover from PAUL B. ANTON and WILLIAM I. DONNER, as Executors of the Estate of SAMUEL DONNER, deceased, the sum of $452,210.74 in satisfaction of her lawful claims against the Estate of SAMUEL DONNER, deceased.

(2) That Plaintiff, RUTH JEAN DONNER, be and she is hereby declared entitled to and shall recover from PAUL B. ANTON and WILLIAM I. DONNER, as Executors of the Estate of SAMUEL DONNER, deceased, such further sum as shall be in an amount equal to the deficiency, if any, in the full satisfaction of that certain bequest made to the Plaintiff, RUTH JEAN DONNER, in Item 3(c) of the Last Will and Testament of SAMUEL DONNER, deceased.

(3) Plaintiff, RUTH JEAN DONNER, be and she is hereby declared entitled to and shall recover from LARNA KATZ DONNER by way of equitable lien upon, and shall be equitably subrogated to, the dower award to LARNA KATZ DONNER in the Estate of SAMUEL DONNER, deceased, to the extent that the dower claim of LARNA KATZ DONER shall reduce RUTH JEAN DONNER'S bequest of ONE MILLION DOLLARS, tax free. Provided, however, that such lien shall be satisfied and discharged in the event the money Judgment awarded against the Executors of the Estate of SAMUEL DONNER, deceased, in Item (2) above be satisfied in full.

(4) The Court further reserves jurisdiction to enter such other orders as may be necessary to carry into effect the provisions of this Judgment.

(5) That execution shall be withheld until further order of the Court.

[1, 2] At the outset of our discussion, we acknowledge the assiduous efforts of the able trial judge in providing extensive findings of fact to assist us in our review of the numerous issues on appeal. These findings of fact come to this court clothed with the presumption of correctness and will not be disturbed upon appellate review absent a showing that they are clearly erroneous or totally without any substantial evidence in their support. *Department of Transportation v. Morehouse,* 350 So.2d 529 (Fla. 3d DCA 1977); *Courshon v. Fontainebleau Hotel Corp.,* 307 So.2d 901 (Fla. 3d DCA 1975). We are not however bound by the trial court's legal conclusions where those conclusions conflict with established law. *Holland v. Gross,* 89 So.2d 255 (Fla.1956).

> "A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. 3 Am.Jur. 471. When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse

> because the trial court has 'failed to give legal effect to the evidence' in its entirety." Id. at 258.

In light of these controlling principles of law, we proceed to carefully examine the final judgment rendered below. The first issue requiring resolution is the trial court's conclusion that Larna joined with the decedent to perpetrate a fraud upon Ruth. The trial court held that Larna, by her election to take dower, "joined in" with Sam to defraud Ruth of her (Ruth's) promised $1,000,000 bequest. Therefore, as a result of this allegedly fraudulent conduct engaged in by Sam and Larna, the trial court ruled that Ruth was entitled to a judgment sufficient to uphold her promised bequest. Larna challenges on appeal the conclusion that she joined in any fraudulent conduct against Ruth. She contends that she never had knowledge of the contents of the settlement agreement and cannot be "charged with knowledge" of the restrictions imposed upon her dower rights by that agreement since (1) she had no actual knowledge of the contents of the agreement; (2) she had no duty imposed upon her by law to ascertain the provisions of the agreement; and (3) in any event, no fraud was established by the facts adduced below. Finally, she contends that even if there was fraud on Sam's part, the record is not sufficient to prove the joinder by Larna in such fraud. We agree.

[3] To establish fraud attributable to Larna under the circumstances of this case requires: (1) a showing that Ruth was defrauded by Sam's willful breach of the settlement agreement; (2) a showing that Larna was aware of the restrictions imposed upon her by that agreement and considered herself to be bound by it; and

(3) a showing that Larna intended to join in to defraud Ruth of her promised bequest. Our review of the record convinces us that all of these essential elements were missing and that therefore the trial court erred when it concluded that Larna joined in with Sam's alleged fraud upon Ruth.

[4] In the first place, we are not persuaded that it was ever conclusively established below that any fraud was perpetrated upon Ruth by Larna or by Sam. The trial court based its conclusion that Sam defrauded Ruth by his willful and knowing breach of the settlement agreement and his subsequent joinder in the antenuptial agreement shortly thereafter. This portion of the final judgment is open to serious challenge.

Sam may have never intended to abide by his agreement with Ruth. The trial court found that he consciously intended to breach the settlement agreement at his earliest opportunity. That may be so but a willful breach of contract alone, without more, is insufficient in law to constitute fraud:

> ". . . [T]he fraudulent breach of a contract does not give rise to an action for fraud, and therefore where the only fraud charged relates to a breach of the contract, and not to its inducement or making, no action for fraud exists." 37 Am.Jur.2d *Fraud & Deceit* §21 (1968).

The trial court did not find fraud in the inducement nor would the record support such a finding.[13] Moreover, had Sam promised Ruth that he would require his future spouse to waive dower as an inducement to entice her to accept the settlement agreement, this still would not amount to fraud in the legal sense. *Harrington v. Rutherford,* 38 Fla. 321, 21 So. 283 (1896); *Brod v. Jernigan,* 188 So.2d 575 (Fla. 2d DCA 1966). But see *Ashland Oil, Inc. v. Pickard,* 269 So.2d 714 (Fla. 3d DCA 1972).

[5, 6] Further, Sam's breach of contract cannot be "passed on" to Larna regardless of his culpability.

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[13]The trial court found that Sam willfully, knowingly and with conscious intent to do so, breached his settlement agreement by entering into the antenuptial agreement *after* having finalized the Sam-Ruth agreement:

> "The Court further finds that by virtue of the foregoing, the decedent, SAMUEL DONNER, willfully and knowingly and with the conscious intent to do so, breached his Settlement Agreement with his wife, RUTH JEAN DONNER, by his failure to comply with the terms of Paragraph 8 of the Settlement Agreement. That the willful conduct of SAMUEL DONNER knowingly entering into the Antenuptial Agreement with LARNA KATZ within a matter of days after having finalized his Separation Agreement with his wife RUTH, which Antenuptial Agreement was in direct contradiction and violation of the contractual agreement with his wife constituted a fraud upon RUTH JEAN DONNER which has now been joined in by LARNA KATZ DONNER by virtue of her election to take dower and against the Will of her husband wherein she was named as the sole residual beneficiary."

This is not sufficient in our opinion to justify fraudulent activity on Sam's part.

Larna was not a party to the settlement agreement and had no contractual relationship whatsoever with Ruth. She made no promises to Ruth or engaged in any misrepresentations. Ordinarily, a contract cannot bind one who is not a party thereto since to create a valid contract there must be reciprocal assent to a certain and definite proposition. *Strong & Trowbridge Co. v. H. Baars & Co.*, 60 Fla. 253, 54 So. 92 (1910). Sam's willful breach of contract alone is not sufficient to pin culpability upon Larna. Accordingly, Larna cannot be said to have breached the settlement agreement with Ruth.

We next turn to the issue of whether Larna was aware of the restrictions imposed upon her by the settlement agreement. Initially we note that the trial court never found that Larna had actual knowledge of the provisions of the settlement agreement. The evidence presented below was never conclusive on that point.[14] Instead, the trial court found that Larna was "charged with knowledge" of the provisions of that agreement. The trial court arrived at this conclusion based upon the following findings of ultimate fact: (1) Larna knew that the settlement agreement had been entered into by Sam with Ruth; (2) the divorce decree and settlement agreement were matters of public record available for her perusal; and (3) Larna's previous personal experience in entering into a property

[14]We cannot accept Ruth's assertion, made in her brief and again at oral argument, that the trial court found that Larna had actual kowledge of the contents of the settlement agreement. Our reading of the final judgment convinces us that no such finding was ever made. Moreover, a careful review of the record reveals an absence of substantial competent evidence upon which to base such a finding.

settlement agreement with her former husband should have put her on notice of the provisions of the Sam-Ruth agreement. Since Larna was "charged with knowledge" of the settlement agreement, she was, under the reasoning employed by the trial court, by implication, bound by the provisions of that agreement. The settlement agreement thus obligated Larna to waive dower in Sam's estate as a condition of marriage, and the trial court concluded that it was valid and enforceable.

The trial court fell into error when it concluded that Larna was "charged with knowledge" of the contents of the settlement agreement. Neither the facts as found in the final judgment nor our careful review of the record discloses evidence sufficient to justify this legal conclusion. Larna was not charged with knowledge of the provisions of the settlement agreement since she had no actual knowledge of that agreement and no duty to inform herself of its contents. Such a duty, had it existed, may have been sufficient to constitute culpable negligent ignorance equivalent in law to actual knowledge. The trial court however reached its conclusion based upon its determination that Larna had such a duty to inquire as to the contents of the settlement agreement and that she breached this duty by intentionally abstaining from all inquiry into the provisions of that agreement in order to avoid notice of its restrictions upon her dower rights. As authority for its conclusion, the trial court cited 23 Fla.Jr. *Notice and Notices* §6 (1959), as follows:

> ". . . [N]egligent ignorance has the same effect in law as actual knowledge. And wherever facts put a person on inquiry notice

will be imputed to him if it is made to appear that he has designedly abstained from inquiry for the purpose of avoiding notice. A person has no right to shut his eyes or ears to information, and then say that he has no notice. The law will not permit him to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. If he has either actual or constructive information and notice sufficient to put him on inquiry, he is bound, for his own protection, to make that inquiry which such information or notice appears to direct should be made. If he disregards that information or notice which is sufficient to put him on inquiry and fails to inquire and to learn that which he might reasonably be expected to learn upon making such inquiry, then he must suffer the consequences of his neglect." (footnotes omitted)

We have no disagreement with the law quoted above. The trial court, however, omitted the initial, highly relevant, portion of the quotation from Florida Jurisprudence which, when included, materially influences the expression of the law on point:

"Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself. *Where there is a duty of finding out and knowing, negligent* ignorance has the same effect in law as actual knowledge. . . ." (emphasis supplied).

[7, 8] Even assuming that Larna's ignorance of the prior agreement was negligent, nowhere in the proceeding below or here on appeal has there been an assertion that Larna had any duty to inquire as to the effect of the settlement agreement upon her impending antenupital agreement. Simply stated, she had no such duty, and without it, she could not be "charged with knowledge" of that agreement. Without a duty to inquire, negligent ignorance no longer has the same effect in law as actual knowledge. *Cf. Applefield v. Commercial Standard Insurance Co.*, 176. So.2d 366, 377 (Fla. 2d DCA 1965) and authorities cited therein. Without some knowledge of the contents of the settlement agreement, Larna could not have joined in to defraud Ruth.

[9, 10] In addition to knowledge, a second element necessary to establish actionable fraud sub judice is intent. *Charter Air Center, Inc. v. Miller,* 348 So.2d 614 (Fla. 2d DCA 1977). Even with the requisite knowledge, there must be a conclusive showing of Larna's intent to defraud, or a showing that intent is inapplicable.[15] Nothing in the record herein evidences any indication of intent on Larna's part to join in to defraud Ruth of her expectancy under the will and the settlement agreement. Even assuming arguendo that Larna had knowledge of the contents of the aforesaid agreement, the conclusion that she joined in her

[15]Intent may not be required when constructive fraud is alleged. See generally 14 Fla.Jur. *Fraud & Deceit* §31 (1957); Harreil v. Branson, 344 So.2d 604 (Fla. 1st DCA 1977). The final judgment did not distinguish between actual and constructive fraud and we need not do so here. The court below simply found that Sam's actions "constituted a fraud". See note 13 *supra.*

husband's allegedly fraudulent activity must fail since no evidence of her intent to defraud was ever established.

Ruth has insisted throughout these proceedings that Larna possessed the requisite knowledge of the settlement agreement and that she conspired with Sam to defraud her of the proceeds of her entitlement under the will and the agreement. Ruth simply did not sustain her required burden of proof on the issue of fraud. It was her obligation to prove fraud, Larna was not obligated to disprove fraud. *Biscayne Boulevard Properties v. Graham,* 65 So.2d 858 (Fla.1953). The mere possibility that Larna and Sam may have conspired to defraud Ruth is too tenous a pillar upon which to construct an elaborate theory of relief based on fraud. Moreover, even conceding that some fraud may have existed on Sam's part, a careful review of the record reveals no substantial competent evidence linking Larna to that fraud.

In summary we conclude:

(1) that Ruth failed to establish a prima facie case of fraud against either Sam or Larna;

(2) that Larna did not have actual knowledge of the contents of the settlement agreement;

(3) that Larna could not be "charged with knowledge" of the contents of the settlement agreement since she had no duty prescribed by law to inquire into the substance of the agreement; and

(4) that it was error to find that she joined in to defraud Ruth since insufficient proof of her intent to do so was adduced below.

II.

The trial court's novel remedy of imposing an equitable lien upon Larna's dower must also fail for the reasons expressed earlier. Since Larna's joinder in fraud was not conclusively established below, it was not appropriate to encumber her entitlement to dower by imposing an equitable lien thereon. Moreover, even had Ruth conclusively proved Larna's joinder in fraud, we would nonetheless have disapproved engrafting an equitable lien on a widow's legitimate right to dower under our law. Such a lien is simply not authorized under Florida law.

[11-14] Dower is a right of the wife granted to her by law and vests on the death of the husband. *Bowler v. Bowler,* 159 Fla. 447, 31 So.2d 751 (1947). The inchoate right of dower is purely a prerogative of the legislature which may modify or abolish it at will. It is a personal right which may be exercised only by the widow. *In Re Estate of Pearson,* 192 So.2d 89 (Fla.2d DCA 1966). Upon vesting at the death of the spouse, dower is not subject to, affected by, or altered by the acts of the husband, including, but not limited to, contracts which he may have entered into without the wife's actual knowledge or consent. Our own Supreme Court has discussed dower in these words:

"It arises upon marriage, as an institution of the law. The inchoate right of dower has some of the incidents of property. It partakes of the

nature of a lien or encumbrance. It is not a right which is originated by or is derived from the husband; nor is it a personal obligation to be met or fulfilled by him, but it is a creature of the law, is born at the marriage altar, cradled in the bosom of the marital status as an integral and component part hereof, survives during the life of the wife as such and finds its sepulcher in divorce." *Pawley v. Pawley,* 46 So.2d 464, 472-473 n.2 (Fla.1950), cert. den. 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed. 632 (1950).

[15, 16] Applying these principles sub judice, we conclude that Larna cannot be deprived of any portion of her dower as a result of the unilateral action of her husband in contracting away that right in a property settlement agreement with another. Her dower right is paramount over the restrictions contained in the settlement agreement. It cannot be contracted away without her consent. That provision of the settlement agreement requiring Larna to waive dower was not enforceable since it was an unjustified encroachment upon her dower right. That right may only be taken away or modified by her voluntary consent, by her own act or by statute. *In Re Estate of Cardini,* 305 So.2d 71 (Fla. 3d DCA 1974). Thus, the trial court's action of engrafting an equitable lien upon Larna's dower was not authorized by law and cannot be sustained on appeal.

Finally, even if Larna's dower was vulnerable to her husband's action, the equitable lien remedy was nonetheless erroneous under the circumstances of the instant case. There is no authority for the imposition of such a lien on a widow's dower. No authority was cited by the court below justifying the imposition of such a

lien and no authority has been cited by the parties in its support.

[17] An equitable lien is generally a fixture of property law imposed when the complainant has no adequate remedy at law and without it, injustice would result. It is a right of a special nature over a particular property that may arise from a written contract which shows an intention to charge the particular property with a debt or obligation, or it may arise out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings in a particular case. *Crane Co. v. Fine,* 221 So.2d 145 (Fla.1969); *Jones v. Carpenter,* 90 Fla. 407, 106 So. 127 (1925).

We need not review at any length the various applications of equitable lien law since such a lien is clearly not appropriate here. To our knowledge, an equitable lien has never been imposed in circumstances remotely similar to those arising in the case at bar and we would hesitate long and hard before extending its application to a widow's right to dower. We are therefore unable to approve the equitable lien remedy employed with such ingenuity by the court below.

III.

[18, 19] Ruth's contention that Sam's marriage to Larna was a nullity since it was so permeated by fraud is without merit based upon our earlier conclusion that fraud was not established below. It is clear that one of the strongest presumptions of the law exists in favor of the validity of the last marriage. The party attacking the legality of the last marriage has the heavy burden of

rebutting the presumption that such marriage is valid. *Teel v. Nolan Brown Motors,* 93 So.2d 874 (Fla.1957); *Carey v. Lee,* 360 So.2d 1111 (Fla. 3d DCA 1978). For the reasons expressed earlier in this opinion, Ruth has failed to sustain her required burden of proof on the issue of fraud.[16] We therefore hold that Larna is Sam's lawful widow and entitled to all of a widow's rights under our law. The duration of Larna's marriage to Sam is irrelevant to the issue of its validity. Whether the marriage endures for fifty years or five days has no effect upon its validity so long as all of the statutory requirements have been met at its inception.

We are not prepared, however, to go as far as Larna would have us do and declare the provisions of the settlement agreement requiring Sam's new spouse to waive her dower in favor of Ruth's bequest to be an unconstitutional burden on the right to marry. While we recognize that the right to marry is of fundamental importance for all individuals [*Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978)], it is not necessary to reach this issue in light of our holding that Larna could not be deprived of her dower right without her consent or in the absence of legislative action.

IV.

[20] As to Ruth's last point involving the imposition of attorneys' fees and costs, we find no abuse of discretion in the trial court's refusal to award attorneys' fees and costs in her favor. Section 61.16,

[16]We note in passing that the trial court did not annul or otherwise invalidate Larna's marriage to Sam on the ground of fraud. The final judgment was silent on this point.

Florida Statutes (1971) does not authorize payment of attorneys' fees to Ruth since this suit was not brought under Chapter 61.

The final judgment is reversed insofar as it purports to impose an equitable lien or any other encumbrance upon any portion of Larna Katz Donner's election to take dower. In all other respects, the final judgment is affirmed.

Affirmed in part, reversed in part and remanded for further proceedings.

CERTIFICATE OF SERVICE

I, Lewis Horwitz, attorney for Larna Donner, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that OCT 29 [redacted] 1979, I served copies of the foregoing motion to dismiss and motion to affirm to the Supreme Court of the United States and on the several parties thereto as follows:

On, Paul B. Anton, William I. Donner, Ruth Jean Donner, Beatrice R. Donner and Edward David Donner, Respondents, by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record, as follows:

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

CASE NO. 79,458

BEATRICE R. DONNER,

Appellant,

vs.

PAUL B. ANTON, WILLIAM I. DONNER, RUTH JEAN DONNER, LARNA KATZ DONNER and EDWARD DAVID DONNER,

Appellees.

MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM

On Appeal from the Supreme Court of Florida

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GROUNDS FOR MOTION TO DISMISS APPEAL AND TO AFFIRM DECISION OF FLORIDA SUPREME COURT

Appellees herein file this their Motion to Dismiss the Appeal of the Appellant, BEATRICE R. DONNER, and Motion to Affirm the Decision of the Florida Supreme Court on the ground that said appeal does not present a substantial federal question pursuant to Rule 16 of this Court and the judgment rests on an adequate non-federal basis. The decision of the Florida Supreme Court denying certiorari should be affirmed as same does not conflict with the Federal Constitution. *In Re Estate of Donner,* 364 So.2d 753 (Fla. 3d D.C.A. 1978); *cert. den.,* 373 So.2d 457 (Fla. 1979).

BEATRICE R. DONNER has challenged by her appeal, the constitutionality of Florida's former Dower Statute as set forth in §731.34 of the Florida Statutes (1971) and set out in Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Appellees, PAUL B. ANTON and WILLIAM I. DONNER, as Co-Personal Representatives of the Estate of SAMUEL DONNER, object to the Statement of the Case set forth by the Appellant, BEATRICE R. DONNER, in her Jurisdictional Statement to this Court, in that same contains editorialized statements which are not in conformance with Rule 15(d) of this Court in that same are not concise statements of the case containing the facts material to the consideration of the question presented. The Appellees herein adopt the Statement of the Case as presented by Appellee, LARNA DONNER, in her Motion to Dismiss and Motion to Affirm, as well as her Appendix in its entirety.

FLORIDA'S FORMER DOWER STATUTE §731.31 OF THE FLORIDA STATUTES (1971) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

ARGUMENT

The Appellant has cited certain decisions of this Court as the basis for sustaining jurisdiction relative to her appeal. *Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920), was an appeal from a Virginia Court decision, which upheld the imposition of a state tax on income from sources and business done, as well as property owned, outside the State of Virginia, where corporations doing no business within the state were not taxed. This

Court held that the state statute imposing such a tax violated the equal protection clause of the Fourteenth Amendment since classification for purposes of legislation must be reasonable and not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. The second case was *Reed v. Reed,* 404 U.S. 71 (1971). This was a proceeding upon separate petitions by a father and mother of a decedent for administration of the decedent's estate. This Court reversed an Idaho statute which provided that as between persons equally qualified to administer estates, males must be preferred to females on the basis that the Idaho statute was grounded solely on discrimination and therefore was violative of the equal protection clause of the Fourteenth Amendment. In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), this Court held that a Massachusetts statute allowing married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single persons violates the equal protection clause of the Fourteenth Amendment. This Court stated that statutory classification between married and unmarried persons was arbitrary and had no substantial relation to the object of the legislation. *Orr v. Orr,* _____ U.S. _____; 59 L.Ed.2d 306 (1979), held an Alabama statute imposing alimony obligations on husbands but not wives to be violative of the equal protection clause of the Fourteenth Amendment since this was solely classification of gender. The final case relied upon the the Appellant, *Caban v. Mohammed,* _____ U.S. _____; 60 L.Ed.2d 297 (1979), is a decision of this Court holding a New York statute violative of the equal protection clause of the Fourteenth Amendment as that

statute permitted an unwed mother, but not an unwed father, to block adoption proceedings by withholding consent since that statute was discrimination as classification by gender only.

In the case at bar, the statute in question is a dower statute which the Appellant challenges based upon her argument that the dower statute arbitrarily picked LARNA DONNER, the decedent's widow, from among the "class of the decedent's wives", and favored her with the vast bulk of the decedent's estate. The Appellant contends that this is a discriminatory choice which has no relation to the object of the legislation due to the fact that widow, LARNA DONNER, was married to the decedent for only 33 days. This argument is totally without merit and is not capable of support by the holdings cited by the Appellant to sustain this Court's jurisdiction, and discussed above.

The Appellant's error can be easily seen by her statement that the dower statute arbitrarily picked LARNA DONNER from among the "class of the decedent's wives". There was only one wife at the time of the decedent's demise, and that was LARNA DONNER, the decedent's widow. There were, however, two former wives, BEATRICE and RUTH, who comprise a separate and distinct class other than widows. Each had her opportunity prior to the decedent's death to obtain sustenance for her support. The purpose of the dower statute is to provide support for the widow, who, unlike the former wives, has had no opportunity to bargain and negotiate for her support as did BEATRICE and RUTH, from such property as the husband possesses at the time he dies. *Adams v. Adams*, 2 So.2d 855 (Fla. 1941).

The dower statute in question does not choose or classify among "wives" and does treat all persons similarly circumstanced alike. Each and every surviving widow of a decedent in Florida had the same opportunity to rely on Florida's Dower Statute which was in effect when SAMUEL DONNER died. The mere fact that the Appellant is not satisfied with the amount of money she is going to receive from the Estate, does not make Florida's Dower Statute, which is being attacked by the Appellant, unconstitutional as being in violation of the equal protection clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated, the Appellees Paul B. Anton and William I. Donner respectfully contend that their Motion to Dismiss be granted and the decision of the Florida Supreme Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We, AMY LINDA STEELE and DAVID L. KLINE, attorneys for Appellees, PAUL B. ANTON and WILLIAM I. DONNER, as Co-Personal Representatives, and members of the Bar of the Supreme Court of the United States, hereby certify that on the day of November, 1979, we served copies of the foregoing Motion to Dismiss Appeal and Motion to Affirm to the Supreme Court of the United States and on the several parties thereto as follows:

On BEATRICE R. DONNER, Appellant, and LARNA DONNER, RUTH JEAN DONNER, and EDWARD DAVID DONNER, Appellees, by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record, as follows:

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